IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 513

UNITED STATES OF AMERICA, ex. rel, W. V. HUGHES,
Appellant,

vs.

ROY B. GAULT, United States Marshal, *Appellee.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

REPLY BRIEF FOR APPELLANT.

HERBERT POPE,
FRANK E. HARKNESS,
Attorneys for Appellant.

CHARLES E. HUGHES,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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The brief for the Government in this case relies upon *Rodman* v. *Pothier,* 264 U. S. 399, as supporting the decisions of the Commissioner and the District Court. But *Rodman* v. *Pothier* held merely that disputed and doubtful questions should not be decided in removal proceedings, and counsel for the Government fail to point to the existence of any doubtful or dis-

puted question in the case at bar which would bring it within that rule.

They say, it is true, that the Commissioner "may" have entertained a doubt as to the legality of the conditions under which appellant was conducting his business (p. 35), but they do not undertake to show that there was anything in the record which could justify this hypothetical doubt. Upon their own statement of the evidence, it showed conclusively that the only combination between the defendants related to metallurgical research and the exchange of trade information, and repelled any inference of an agreement to use this information for unlawful purposes, and counsel for the Government do not intimate that any other construction can be placed on it.

We submit that any doubt which may have existed prior to the decisions in *Maple Flooring Manufacturers' Association* v. *United States,* 268 U. S. 563, and *Cement Manufacturers' Protective Association* v. *United States,* 268 U. S. 588, as to the legality of this situation, was effectively dispelled by those decisions.

The only doubtful question presented by the record is the question whether the indictment, which stated no facts showing jurisdiction in the Northern District of Ohio, and did not connect the appellant with any specific illegality, was sufficient to put appellant to his evidence. The position of the Government is that this doubt was conclusively determined against the appellant by the overruling of a demurrer filed in the trial court by other defendants, and that this indictment is a sufficient basis for an order of removal, even though every inference of illegality which can be drawn from it has been fully met by evidence in rebuttal.

Manifestly, if the judgment of the trial court is conclusive on the question of the sufficiency of the indictment to make out a case of probable cause, and if unimpeached and uncontradicted evidence in rebuttal of the indictment may be ignored by the removing tribunal, no matter how clear and convincing it is, on the theory that only the trial court can pass on it, there is nothing left upon which the removing tribunal can exercise any judicial discretion.

We respectfully insist that neither *Rodman* v. *Pothier* nor any other case decided by this court supports any such doctrine. Nor can it be contended that the appellant received the hearing to which he was entitled under the Constitution, merely because the Commissioner admitted evidence in rebuttal. To admit evidence and to place an interpretation upon it which it will not reasonably bear as the Commissioner did, or to ignore it as the District Court did, is to deny the constitutional right of the accused to rebut the case made by the indictment as effectually as it would be denied by excluding the evidence entirely.

The extradition cases cited by the Government are not in point. In *Charlton* v. *Kelly,* 229 U. S. 447, there was competent legal evidence produced to show the commission of the crime. The question arose as to the defense of insanity. This Court pointed out that by the law of New Jersey, the place where the fugitive was found and the law of which, under the extradition treaty, was to be invoked, "insanity as an excuse for crime is a defense and the burden of making it out is upon the defendant." So far as probable cause was concerned, and the case required to be made out by the treaty, there was abundant evidence.

In *Collins* v. *Loisel,* 259 U. S. 309, another extradi-

tion case, the court found that the evidence to support the charge of obtaining property by false pretenses was adequate. The court reviewed the evidence (p. 314) and said that it was clear that this evidence would justify a conviction not only for cheating, but also of obtaining property under false pretenses. Collins was allowed to testify to the things which might have explained ambiguities or doubtful evidence in the case made against him. "In other words," said this court, "he was permitted to introduce evidence bearing upon the issue of probable cause. The evidence excluded related strictly to the defense." This statement could not possibly be taken to mean that a defendant in a removal case could not show absence of probable cause and destroy the whole basis for the charge against him. In the cases cited by the Government this court was careful to point out that there was sufficient evidence to justify a finding of probable cause and on this ground alone was the dismissal of the writ of *habeas corpus* sustained.

In *Gayon* v. *McCarthy,* 252 U. S. 171, the court reviewed the evidence at length (pp. 173-178) and reached its decision in the case, which was one of *habeas corpus,* only on the ground that there was "*substantial evidence*" before the Commissioner showing probable cause.

This court has held (*Tinsley* v. *Treat,* 205 U. S. 20, and the cases following it) that while the indictment, if it is a valid and sufficient one on its face, may be regarded as enough to put the defendant to his proof, the defendant has a constitutional right to show the absence of probable cause. Of course, this constitutional right is a substantial one. It is not a matter of form. But of what consequence is the right, if the

defendant's evidence destroys the basis for a finding of probable cause and his evidence is ignored?

This Court has held in *habeas corpus* cases that the indictment is not conclusive, and that it is a denial of a constitutional right to regard it as conclusive. But to receive evidence which leaves no basis for a finding of probable cause and then to sustain the removal is to make the indictment conclusive. We submit that this is what the court below did.

HERBERT POPE,
FRANK E. HARKNESS,
Attorneys for Appellant.

CHARLES E. HUGHES,
Of Counsel.

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CASES CITED

STATUTES CITED

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v.

ROY B. GAULT, UNITED STATES MARSHAL

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA

BRIEF ON BEHALF OF THE MARSHAL

PREVIOUS OPINIONS IN THE PRESENT CASE

The opinion of the District Court (not reported) is printed on pages 73–75 of the Record. An appeal by another defendant to the same indictment involving another point was disposed of in *United States ex rel. Rutz* v. *Levy,* 268 U. S. 390. A petition for *certiorari* by still another defendant to the same indictment was denied on October 19, 1925. (*Fitzgerald* v. *United States,* 6 Fed. (2) 156; *certiorari* denied, 46 Sup. Ct. Rep. 26.)

GROUNDS OF JURISDICTION

The judgment to be reviewed is that of the District Court for the Southern District of Iowa, dated April 29, 1925, appearing at R. 75.

The appeal is taken under Section 238 of the Judicial Code as it existed prior to the amendment of February 13, 1925. (Act of February 13, 1925, Ch. 229, 43 Stat. 936.)

STATEMENT

This is a direct appeal from an order of the District Court of the United States for the Southern District of Iowa discharging a writ of *habeas corpus* by which appellant sought to obtain a review of an order made by a United States Commissioner committing him to custody pending the issuance of an order of removal. The Government sought to remove him to the Northern District of Ohio for trial there under an indictment (R. 8–15) charging him and 46 other persons and 46 corporations with having engaged in a combination in restraint of interstate trade and commerce in malleable iron castings, in violation of Section 1 of the act of July 2, 1890, c. 647 (26 Stat. 209), known as the Sherman Antitrust Act.

At the hearing on the writ the District Court had before it the petition (R. 1), to which were attached the warrant under which appellant had been brought before the Commissioner (R. 6), the complaint (R. 6, 7), the indictment (R. 8–15), and

a transcript of the procedings had before the Commissioner (R. 16–72).

At the hearing before the Commissioner, appellant admitted his identity. The Government offered in evidence a certified copy of the indictment and rested. (R. 17.)

Thereupon Jasper Blackburn, a witness on behalf of appellant, testified he was President and General Manager of the Everstick Anchor Company, of St. Louis, Missouri, a purchaser of malleable iron castings during the period covered by the indictment, and that during such period his company had purchased all its castings from appellant's company, the Iowa Malleable Iron Company. (R. 19, 22, 30.) There were several malleable iron foundries at St. Louis, and during the period in question he had received solicitations for work from six companies, some of which he named, and two of which are defendants to this indictment. (R. 19, 20.) The witness identified six letters soliciting business received by him in the regular course of business from five malleable iron companies, only one of which is a defendant, and they were received in evidence. (R. 20–22.) He stated he had received other solicitations for business, both written and personal. (R. 22.) The Iowa Malleable Iron Company had solicited business from the witness and had never told him he had been allotted or assigned to it as an exclusive customer. (R. 24, 30.) His selection of a foundry had been based on

price, service, and quality. (R. 25.) Counsel for appellant then asked the witness which of the defendant corporations had solicited his business, naming them (R. 25–31), and it appeared that of the forty-five corporations named the witness had been solicited in person by the St. Louis Malleable Castings Company (R. 28), the National Malleable Castings Company (R. 25, 26), and by letter by the Badger Malleable and Manufacturing Company (R. 26), the Danville Malleable Iron Company (R. 27), the Wisconsin Malleable Iron Company (R. 29, 31), and the Zanesville Malleable Iron Company. (R. 30.) He was uncertain as to the Marion Malleable Iron Works (R. 28), the Dayton Malleable Iron Company (R. 26), the Illinois Malleable Iron Company (R. 27), and the Lakeside Malleable Castings Company. (R. 28.) The St. Louis Malleable Castings Company had quoted him some prices a little lower than appellant's company, but did not get any of his work. (R. 28, 29.) The witness had received other solicitations from persons whose names he could not recall. (R. 31.)

On cross-examination he stated he had never made malleable castings and knew nothing about any communications between manufacturers as to fixing of prices or allotment of customers. (R. 31, 32.)

On redirect examination he stated that he bought from 650 to 700 tons of castings per year, and, based on his experience, he had found the prices

of the Iowa Malleable Iron Company to be about the same as the prices of other manufacturers, or a little lower. (R. 32.) He was familiar with the market prices of castings during the period in question, March, 1921, to March, 1924, and the Iowa Malleable Iron Company's prices were, in his opinion, fair and reasonable. (R. 33.)

On recross-examination the witness stated a case where the St. Louis Malleable Castings Company, a defendant, had quoted a lower price on certain items, but would not take his whole order. (R. 34, 35.)

On redirect examination he stated that prices quoted were f. o. b. and there would be a slight freight saving in dealing with a near-by foundry. (R. 36.)

J. A. Scott testified he was Secretary and General Manager of Brown, Lynch & Scott Company, manufacturers of agricultural implements, and during the three years prior to March 27, 1924, he had bought all the malleable iron castings used by his company and had bought exclusively from the Iowa Malleable Iron Company. (R. 37.) His trade had been solicited personally and by correspondence. He had destroyed the correspondence. (R. 37, 38.) He had no knowledge of the Association (i. e. the trade association charged in the indictment as having been the means of carrying out the conspiracy). (R. 38.) He recalled solicitations from three named concerns, all of which are defendants, and

thought he had had other solicitations, but was not sure. (R. 38.) Some prices quoted were lower than those he obtained from appellant's company. (R. 39.) He again stated he had never heard of the American Malleable Castings Association, and had no knowledge that his company was allotted to the Iowa Malleable Iron Company as a customer or that he was restricted in any way in his purchases. (R. 39.) The witness explained that in view of the good service obtained from appellant's company he would not have been justified in incurring the expense of moving patterns from one foundry to another. (R. 39.) He was satisfied from his knowledge of conditions in the malleable iron business that he was getting a fair price. (R. 39, 40.)

On cross-examination he stated he would not have been satisfied with trade conditions if he had known that the prices were arbitrarily fixed. (R. 40, 41.)

After an adjournment, the Commissioner rendered an opinion sustaining the Government's motion to strike out the testimony of the witnesses Blackburn and Scott (R. 44–46), in which he held that while the testimony of these witnesses might be admissible on the main trial it did not tend to rebut the issue of probable cause.

The appellant himself testified he was Secretary and General Manager of the Iowa Malleable Iron Company, and that he had been employed by it for 20 years. (R. 42.) During the period covered

by the indictment he had been in charge of all departments of operation and had solicited most of the business for his company. (R. 42.) He described the foundry's product in some detail. (R. 42, 43.)

After the adjournment appellant testified that his company had customers throughout the United States west of Pittsburgh. (R. 46, 47.) Its prices had been based upon actual cost accounting records and past experience. (R. 47.) No individual, corporation, or association had ever suggested that prices should be raised or lowered. (R. 47.) Appellant offered in evidence a paper purporting to be a list of customers of the Iowa Malleable Iron Company prepared from the company records under his supervision, which was excluded as not being the best evidence. (R. 47, 48.) Counsel for appellant made an elaborate offer of proof (R. 48–50) in substance offering to disprove all the allegations of the indictment, part of which the Commissioner felt was inadmissible and part admissible. (R. 50.)

The examination of appellant continued and he stated that his company joined the American Malleable Castings Association in 1914 or 1915 for the

> * * * benefit of the research and laboratory experience and the program of technical work that the Association were putting on then and contemplated carrying on to a greater degree in the future years. (R. 50.)

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All producers of malleable iron were and had been in competition with the manufacturers of gray iron and steel. The Association had increased the tensile strength and elongation of malleable iron. It maintained a metallurgical department, the work of which he described in some detail. (R. 51, 52.) The benefit of the cooperative research work was the sole reason his company joined the Association. (R. 52.) He attended meetings of the Association at Chicago regularly, and had never discussed prices there except in a casual way with other members, nor the allocation nor assignment of customers. (R. 52, 53.) He familiarized himself with market conditions by attending meetings and solicited trade by correspondence without reference to the Association. (R. 53, 54.) The Association never requested him not to solicit business, nor did he make a similar request of anyone. (R. 54.) An objection was sustained to a question as to what the witness did upon receipt of an inquiry from a customer, before quoting a price. (R. 54.) Thereupon he categorically and seriatim denied the charges contained in the indictment. (R. 55.) He stated he obtained all of his customers—about 178 in number—in the ordinary course of competitive trade. (R. 56.) So far as he knew none of the customers he had lost had been assigned or allotted to other manufacturers. (R. 57.) Competition depended upon price, delivery, and quality. A list of his

customers was again offered in evidence and excluded on the ground that it did not tend to rebut the issue of probable cause. (R. 57.)

On cross-examination an entirely new phase of the trade association's activities was developed. Appellant admitted the Association maintained an "*information service*" in charge of Robert E. Belt, one of the defendants. As to whether his company belonged to the information service of the Association he said, "we did if we asked for it, certain information." (R. 60.)

He did not know whether other members subscribed to the information service or not. (R. 60, 61.) He testified it would be pretty hard to state in one answer what information he received from Belt. The latter would supply them with "information with reference to the character of work that a particular user possibly of malleable iron castings required and condition of pattern equipment * * *" (R. 61.) He had never assigned customers or had customers assigned to him. (R. 61.) If he had an inquiry from a customer listed by another member he would inquire of the Association as to the character of the work and condition of the customer's pattern equipment. (R. 61, 62.) He might have asked Belt for some information and received it. (R. 61.) He received no information from Belt regarding customers unless he asked for it. (R. 62.) Sometimes he would ask Belt who "listed" a buyer of malleable iron

in order that he might make inquiry of such foundry regarding the character of the customer's work. He did this because the customer frequently could not furnish the information desired with respect to his work. (R. 62.)

At this point appellant's counsel resumed direct examination. The witness testified it was impossible to quote a price without absolute and accurate knowledge as to the condition and grade of the castings required and of pattern equipment. (R. 63.) He could, and in a few instances did, obtain such information by communicating with the foundry, the name of which was supplied by the Association. (R. 64.) He only communicated with the Association as to about 10 per cent of the inquiries for business received (R. 65), and reported 25 per cent of his business. (R. 70.)

On further cross-examination he testified he saw all mail received by his company. (R. 65, 66.) At R. 66 and 67 he stated:

> And I could ask the Association for who was making that work, or who had listed them as a customer. I could use my own judgment, if I wanted to go any further, and ask the concern who had been making it for further information if I so desired. But I considered it my perfect right and privilege to quote it direct without getting any more information if I could get that information.

The following is reported on pages 67 and 68 of the Record:

> Q. Now what other information did you receive from this Company besides that?—A. I received the information as to prices of business closed.
>
> Q. What is that?—A. The prices of the business that was closed.
>
> Q. What do you mean by that?—A. The price of any contract that might be let that was already let.
>
> Q. That is, what some other company had agreed to furnish——A. No, sir, not what they had agreed to; what they had already entered into contract to furnish.
>
> Q. Entered into contract to furnish. You got that information?—A. You could if you so desired.
>
> Q. What did you use that information for?—A. That would be in response to an inquiry. You could use that information if you lost a customer.
>
> Q. Well, how did you use it?—A. Give you the information how much the other fellow beat your price if he got the business.
>
> Q. And the next time why you could——A. I could beat his.
>
> Q. You could beat his the next time?—A. If I could do it consistently and according to good business judgment.
>
> Q. And that was the reason, the sole reason, for sending in those closed contracts, was it, to this Association?—A. So far as I know.

Q. Did your Company send in closed contracts of that kind so another firm could beat you if he could beat you the next time?—A. We sent in closed contract prices; yes, sir.

Q. And you were willing to do that, knowing that somebody else was going to use that to beat your price?—A. Not necessarily knowing that. That would be up to them.

Q. You sent it in there for that sole purpose?—A. No; not for that sole purpose.

Q. What other purpose?—A. Covering business closed.

Q. Well, why would the Association care about your business closed?—A. That would give some information as to the general trend, possibly, of prices, general market conditions.

Q. That was the sole reason you sent it in, was to let them know what you were furnishing stuff for?—A. So far as I know; yes, sir.

Q. That wasn't your idea at all, was it, Mr. Hughes? Wasn't it sent in there for the reason to show that the various members of this Association were living up to their agreements?—A. No, sir; it was not

Q. Now you had listed with this Association all the customers you furnished; didn't you?—A. No.

Q. You didn't list them that way?—A. Listed them covering a certain period.

Q. Well now supposing your fiscal year—did you list all the customers you furnished for that year?—A. We listed in September

all the concerns for whom we had made castings the previous six months.

Q. That was with the Association; you sent in the list?—A. Yes.

Q. And what was the idea of sending in that list?—A. To give other concerns the benefit of inquiry if they cared to make inquiry regarding the character of that concern's work or any one of those concerns' work.

Q. So they could write to you and find out what you were making for them?—A. No, sir. So they could get information regarding pattern equipment and the character of the work.

Q. And how much you were furnishing them for?—A. No, sir.

Q. Nobody ever wrote you and asked you how much you was furnishing a certain contract for?—A. Not except—unless the contract had been closed, and wanted to know if we got the business.

Q. They wouldn't need to write you direct for that would they? They could get it from the Association.—A. They could get it from the Association.

Q. And every member of this Association had every closed contract that they made in a certain period in that Association?—A. I don't know about anybody else. We didn't have half of ours in there.

Q. Just on your allocated territory, that is where you had——A. Didn't have any allocated territory.

He testified he might have asked the Association who did the work of a particular customer or inquired about the price of business closed, but had no correspondence regarding the assignment of such customer. (R. 69.) The Association had about 60 members. (R. 69.) The following is reported on page 70 of the Record:

> By the Commissioner:
>
> Q. Mr. Hughes, there is just one question I would like to ask you. If you had some customer in mind, and say you wrote down to this Association, they would give you information as to the class of castings they were using and the pattern equipment?—A. No, no. They would give me the name of the concern, if any such concern listed that concern as a customer, so the information would be available if I cared to follow the inquiry further.
>
> Q. That is, you would have to get the condition of their pattern equipment from the concern who had been making their castings? Is that it?—A. Yes, sir.

On redirect examination the witness stated he made inquiry of the Association regarding the financial standing of some customers and reported business closed with 25 per cent of his customers. (R. 70.) This concluded his testimony.

The Commissioner thereupon declined to hear further customer witnesses, and stated (R. 71):

> I don't see where that would be material. I think that would be purely defensive, if the

> evidence was of the same class as was given by Mr. Blackburn and Mr. Scott, who were buyers of malleable iron castings used by them in the manufacture of machinery and other things that they were making. They naturally wouldn't know anything about a contract with this Malleable Castings Association and whether they regulated prices or not.

After hearing argument the Commissioner made an order of commitment as follows (R. 71, 72):

> I feel Mr. Price that on the showing made here by the evidence introduced by the Government and the defendant and by the Government on cross examination of Mr. Hughes that there is enough evidence here to show that there is some agreement and sustaining the Government's claim of probable cause for holding the defendant as a member of this Association charged with restraint of trade under the Anti-Trust Act. And with the evidence closed, the Court holds there is probable cause and the defendant will be committed and the bail fixed at $5,000.00 pending the issuance of the order of removal.

Eighteen errors are assigned to the action of the District Court (R. 77–83), the substance of which are that the proceedings resulting in appellant's detention were in violation of Article III, Section

2, Clause 3 of the Constitution, and the Fifth and Sixth Amendments thereto.*

Three points are argued in appellant's brief, which may be summarized as follows:

1. That the District Court held the indictment was conclusive evidence of probable cause and disregarded the evidence adduced before the Commissioner.

2. If the evidence before the Commissioner demonstrated lack of probable cause,

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*ARTICLE III, SECTION 2, CLAUSE 3. The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Amendments.—ARTICLE V. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War, or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE VI. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

appellant was entitled to be discharged in *habeas corpus* proceedings.

3. The evidence demonstrated lack of probable cause.

SUMMARY OF ARGUMENT

In a removal proceeding in the federal courts the committing magistrate must determine three questions: (1) Whether an offense appears to have been committed; (2) whether it appears to have been committed in the judicial district to which the removal is sought; and (3) whether there is any evidence tending to show that it was committed by the accused.

The production of a certified copy of the indictment which states an offense and alleges jurisdiction in the court in which it was found, together with proof of identity, furnishes *prima facie* but not conclusive evidence of all of these three elements.

The court before which removal proceedings are pending or the court reviewing its action on *habeas corpus* should not attempt to pass on the technical sufficiency of the indictment as a criminal pleading, but should consider whether it, *as evidence,* tends satisfactorily to show the commission of an offense and jurisdiction in the court where it was found to try the accused for such offense. In the case at bar such questions as are raised as to the sufficiency of the indictment are of a character which should be left to be resolved by the trial

court, and not decided on removal proceedings. As the court in which this indictment was found had previously passed on and sustained the indictment, its decision was properly recognized as controlling in the removal proceedings. The indictment in this case is sufficient, in any event, to meet every test which can be applied.

The accused has a constitutional right to rebut the evidence against him. The scope of such rebuttal evidence is largely in the discretion of the committing magistrate. In the case at bar there was no abuse of such discretion. The court in the *habeas corpus* proceedings had before it the same evidence which was before the Commissioner, and seems to have concluded upon such evidence that probable cause existed. But whatever reason it had for discharging the writ, the order should be affirmed, since the record shows that if the evidence as well as the indictment be considered, the action of the Commissioner was correct.

ARGUMENT

I

THE INDICTMENT

(*a*) THE INDICTMENT WAS RECEIVABLE AS PRIMA FACIE EVIDENCE OF WHAT IT STATED

A certfied copy of an indictment is receivable in evidence at a removal proceeding as prima facie evidence of probable cause, but not as conclusive

evidence. *Tinsley* v. *Treat,* 205 U. S. 20, 30, 31. It is evidence, however, only of its existence and of what it states; hence if it states no offense, it will not warrant removal. But if it does state an offense, its allegations are to be taken as true, unless impaired in rebuttal.

(*b*) THE DISTRICT COURT APPRECIATED AND DISCHARGED ITS FUNCTION WITH RESPECT TO APPRAISING THE INDICTMENT

The opinion of the District Court in so far as it related to the indictment was as follows (R. 74, 75):

> As to the indictment, my duty seems to be well expressed in the Opinion of Judge McKeehan in the *U. S.* v. *Mathues, U. S. Marshal* (6 Fed. (2d) 149, 154, 155), in which he says:
>
> "After a careful consideration of this case, I am clearly of the opinion that the questions that exist regarding the sufficiency of this indictment on the three elements concerning which it is my duty to inquire, are of such a doubtful and disputable nature, that they belong to the trial court and the appellate tribunals which will or may review the proceedings there had. Demurrers to this indictment and motions to quash were filed by a number of the defendants before the trial court. Judge Westenhaver, in an opinion which I have examined, sustained the sufficiency of the indictment. It is urged that this opinion passed on the indictment

simply as a pleading and not as a paper averring certain evidential facts. No doubt an indictment might be insufficient as a pleading for some reason not involved in an inquiry as to its sufficiency in an application for a warrant of removal. But it does not follow that the converse is true, and I think that upon a demurrer or a motion to quash in a federal court, an indictment which is insufficient on any of the elements involved in an application for removal could not be sustained.

"It is further urged that the decision of the learned Judge of the trial court is not binding upon this court. That is probably true, but it has very great weight here as bearing on the probable sufficiency of this indictment. Having regard to the rule that doubtful issues of law and fact in proceedings of this nature are for the trial court, and having regard to the averments contained in this indictment and to Judge Westenhaver's opinion, I think this court would be taking a long and unjustifiable step in refusing to order the removal of these defendants on the ground that the indictment is clearly insufficient on any of the three elements involved in this inquiry. This case furnishes a good illustration of the importance of adherence to the rule that doubtful and disputable questions are for the trial court. Suppose, by way of illustration, that on application for the removal of, say, twenty of the defendants, various District Judges decide that they shall be removed, and that various District Judges decide as to another

twenty, that the indictment is insufficient and they shall not be removed. Suppose then that a trial and conviction is had in the District Court for the Northern District of Ohio, and the conviction sustained by the Circuit Court of Appeals for the Sixth Circuit, and later by the Supreme Court of the United States. The net result would be that twenty defendants would have escaped trial, because various District Judges had made erroneous decisions as to the sufficiency of the indictment.

"It is important in the interest of protecting individual rights that no defendant shall be ordered removed for trial to another district unless a qualified judicial officer shall determine after examination of the indictment that due cause for the removal exists. It is equally important, in the interest of an effective administration and enforcement of law, that every Judge to whom application for a warrant of removal is made shall not undertake to make his own independent decision on doubtful and disputable questions, but that these shall be raised and determined in the trial court, and reviewed and determined finally by the appropriate superior judicial authority."

So far as the indictment in this case is concerned, it is a general rule that if a certain District Court decides a case, such decision is by comity binding upon other District Courts until it is passed upon by some higher court. This is true though the first court decides only a principle involved, even though it arises in an entirely different case.

> Now this being generally true, the rule should have special application in a case like this, where the indictment has been reviewed fully by Judge Westenhaver, the trial Judge, who says:
>
> "In my opinion after due consideration to all objections urged and examination of adjudged cases, the indictment is unexceptionable both as to form and substance."
>
> It seems to me that this should be final at this stage of the case. In fact, it would almost seem like audacity for me to hold contrary to the opinion of Judge Westenhaver, who gave the case most careful consideration, and before whom many of the defendants are to be tried as the record now stands. (R. 74, 75.)

It is apparent from the opinion that Judge Wade in the case at bar fully appreciated his duty with respect to passing on the sufficiency of the indictment. He recognized he had the power to hold the indictment insufficient, but declined to do so because he thought the decision of the trial court in overruling demurrers (*United States* v. *National Malleable and Steel Castings Co.*, 6 Fed. (2d) 40), should be followed on the principle of comity. In *Stallings* v. *Splain*, 253 U. S. 339, it was said, on pages 344 and 345 of the opinion:

> If the validity of the indictment was open to reasonable doubt, it was to be resolved not by the committing magistrate but, after the removal, by the court which found the indictment.

In the case at bar this had already been done by the trial court.

Furthermore, if the indictment is sufficient, the reasons given by the District Court for its holding are immaterial.

(*c*) THE INDICTMENT CHARGES AN OFFENSE AGAINST THE UNITED STATES, ALLEGES JURISDICTION IN THE TRIAL COURT, AND WAS THEREFORE SUFFICIENT ON REMOVAL

The indictment charges that certain named separate and independent corporations from January 1, 1917, to March 27, 1924, manufactured 75% of the malleable iron castings made in the United States and sold large quantities thereof in interstate trade and commerce in the Eastern Division of the Northern District of Ohio and elsewhere. (R. 8–12.) Named officers and agents of such corporations, including the appellant, who were "actively engaged in the management, direction, and control of their affairs and business and of their said interstate trade and commerce" are made defendants with the corporations. The appellant is charged to have been an officer and agent of Iowa Malleable Iron Company (R. 12, 13), a corporation defendant having a foundry at Fairfield, Iowa. (R. 10.) One R. E. Belt is made a defendant, he, it is charged, having been secretary and actively engaged in the management of the American Malleable Castings Association, a voluntary

trade association to which each corporate defendant belonged. (R. 14.)

The indictment charges that within the Eastern Division of the Northern District of Ohio all of said defendants "engaged in a combination in restraint of said interstate trade and commerce in malleable iron castings so carried on by said corporate defendants" described as follows (R. 14–15):

> Throughout said period of time said corporate defendants, under said management, direction, and control of their said officers and agents, namely, the said individual defendants, and with such participation of said association and of said Robert E. Belt, its secretary, have carried on the said interstate trade and commerce of said corporate defendants in malleable iron castings in accordance with and pursuant to an understanding and agreement between said corporations to eliminate competition among themselves, as to prices, terms, and conditions of sale, and as to customers; and by agreement have from time to time fixed excessive and noncompetitive prices to be charged by all of them for said castings; and have accordingly quoted prices and made sales of said castings at such prices so fixed; and have assigned and allotted their customers to one another to be held as exclusive customers; and have enforced such assignments by refraining, directly or indirectly, from competing for customers so assigned.

> And the grand jurors aforesaid, upon their oath aforesaid, do further present, that, as a means of securing compliance on the part of each of said corporate defendants with the terms of said agreements, said corporate defendants, throughout said period of time, have been members of and have maintained an organization known as The American Malleable Castings Association, with headquarters at Cleveland, Ohio, and have required said association, among other things, to collect and receive from each of its members information as to the details of such member's business and to distribute such information among all the members for their use in avoiding and preventing breaches of said agreements.

The indictment is good because it charges that the defendants, producers of 75% of malleable iron castings (1) assigned and allotted customers, (2) by agreements fixed excessive and noncompetitive prices, and (3) thereafter refrained from competing for the trade of such customers. The mere doing of the specified acts constitutes an unreasonable combination in restraint of trade. Where, as here, the primary purpose and effect of the combination is to restrain trade, the question of reasonableness is not involved. In *United States* v. *Addyston Pipe and Steel Company,* 85 Fed. 271, Chief Justice Taft, then Circuit Judge (Harlan and Lurton concurring), after discussing the legality of contracts where the restraint complained of

was ancillary to a legitimate main purpose (e. g., a contract by the seller of property not to compete with the buyer and thus diminish the value of the property sold), said (pp. 282, 283):

> But where the sole object of both parties in making the contract as expressed therein is merely to restrain competition, and enhance or maintain prices, it would seem that there was nothing to justify or excuse the restraint, that it would necessarily have a tendency to monopoly and therefore would be void.

Counsel for appellant attack the indictment (Brief 28) on the authority of *Weeds, Inc.* v. *United States,* 255 U. S. 109, where it was held that the phrase "excessive prices" as used in Section 4 of the Food Control Act (Act of August 10, 1917, c. 53, 40 Stat. 276, as amended by Section 2 of the Act of October 22, 1919, c. 80, 41 Stat. 297) was unconstitutional because it set up no ascertainable standard of guilt. This case has no application to the use of the phrase "excessive and noncompetitive prices" in an indictment charging a violation of the Antitrust Laws.

The case of *Chicago Board of Trade* v. *United States,* 246 U. S. 231, cited by counsel for appellant (Brief 28), is not in point. It was only decided there that the facts of that case did not show a violation of the Antitrust Law.

Counsel also endeavor to bring the case at bar within the decisions in *Maple Flooring Manufac-*

turers Association v. *United States*, 268 U. S. 563, and *Cement Manufacturers Protective Association* v. *United States*, 268 U. S. 588. There is nothing except their assertion to support this view. As previously noticed, the indictment here charges a conspiracy to fix excessive and noncompetitive prices and to assign and allot customers among the defendant manufacturers. In the *Maple Flooring case*, Mr. Justice Stone said on page 586 of the opinion:

> We decide only that trade associations or combinations of persons or corporations which openly and fairly gather and disseminate information as to the cost of their product, the volume of production, the actual price which the product has brought in past transactions, stocks of merchandise on hand, approximate cost of transportation from the principal point of shipment to the points of consumption, as did these defendants, and who, as they did, meet and discuss such information and statistics without, however, reaching or attempting to reach any agreement or any concerted action with respect to prices or production or restraining competition, do not thereby engage in unlawful restraint of commerce.

And in the *Cement case* it was stated, on pages 604 and 605 of the opinion:

> Agreements or understandings among competitors for the maintenance of uniform prices are of course unlawful and may be enjoined, but the Government does not rely

> on any agreement or understanding for price maintenance.

The other objections made to the indictment are equally unsubstantial. By way of illustration it is stated, on pages 28 and 29 of the appellant's brief—

> As to the charge that the corporate defendants allotted and assigned customers to one another, it is to be observed that the indictment does not even allege that this was done by agreement and is apparently based on the view that the Sherman Act imposes a duty to compete—a theory which this court has definitely repudiated.

Touching this point the indictment alleges that the defendants

> * * * by agreement, have from time to time fixed excessive and noncompetitive prices to be charged by all of them for said castings; have accordingly quoted prices and made sales of said castings at such prices so fixed; and have assigned and allotted their customers to one another to be held as exclusive customers, and have enforced such assignments by refraining directly or indirectly from competing for customers so assigned. (R. 14.)

The sufficiency of the indictment was vigorously attacked on the petition for *certiorari* filed in this court in *Fitzgerald* v. *United States* (1st Cir.), 6 Fed. (2d) 156, denied October 19, 1925, 46 Sup. Ct. Rep. 26. It was specifically held sufficient on re-

moval by the Circuit Court of Appeals for the Sixth Circuit in *Meehan* v. *United States,* decided March 12, 1926, printed as Appendix A. The Government has also prevailed in the following cases, involving the removal of other defendants to this indictment:

United States v. *Mathues,* 6 Fed. (2d) 149 (D. C. E. D. Penna.);
United States v. *Moore,* 7 Fed. (2d) 734 (D. C. E. D. Ill.);
Steeves v. *Rodman,* 10 Fed. (2d) 212 (D. C. D. R. I.);

and in numerous unreported decisions. In *Nourse* v. *White* and *Rutz* v. *Anderson,* not yet reported (C. C. A. 7th Cir.), judgments dismissing the writ were reversed (opinions printed as Appendices B and C) on the sole ground that the District Judges (sitting as committing magistrates) in each case should have heard rebuttal evidence offered on behalf of the defendants. The defendant Rutz and two of his codefendants have since been ordered removed, and petitions for writs of *habeas corpus* denied.

II

APPELLANT WAS NOT DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO REBUT THE ISSUE OF PROBABLE CAUSE AND HAD A FAIR HEARING BEFORE THE COMMISSIONER

Counsel for appellant do not point out wherein the proceedings before the Commissioner or the

District Court violated the Fifth Amendment; and it is assumed that they now rely on Article III, Section 2, Clause 3 of the Constitution, and the Sixth Amendment as the ground of their appeal. The rights secured by both of those provisions of the Constitution is the right of trial in the State and district wherein the crime shall have been committed. If, therefore, appellant committed a crime against the United States in the Northern District of Ohio, he had neither legal nor constitutional right to object to removal to the District where the trial was to be had. His right at the hearing before the Commissioner was to rebut probable cause, and this is an issue which he could meet only by showing that the charge was "wholly groundless." *Burr's Trials,* Vol. I, p. 11.

Mere denial of the allegations of the indictment is not sufficient to rebut probable cause.

Beavers v. *Haubert,* 198 U. S. 77, 90, 91.
Looney v. *Romero,* 2 Fed. (2d) 22.
Ex parte Ryan, 154 Fed. 217.

Furthermore, where, as here, the hearing demonstrates that there are questions requiring "consideration of many facts and seriously controverted questions of law," they should be left to the determination of the court where the indictment was found. *Rodman* v. *Pothier,* 264 U. S. 399, 402.

In *Tinsley* v. *Treat,* 205 U. S. 20, *supra,* a district judge, sitting as a committing magistrate in a proceeding under Section 1014, Revised Statutes, held an indictment charging an offense against the

Sherman Law to be conclusive evidence of probable cause and declined to hear evidence offered by the accused. Such action was held to deprive the defendant of a right secured by statute under the Constitution. But this is not a case like *Tinsley* v. *Treat*. At the very outset of the hearing (R. 18) the Commissioner stated:

> And I believe that the defendant would have a right to offer evidence if this motion [i. e. a motion to discharge appellant from custody R. 17] is finally overruled.

The summary of the evidence before the Commissioner, *supra*, illustrates beyond cavil that he adhered to this theory throughout the hearing and that appellant was permitted to testify fully concerning the matters charged in the indictment. The Commissioner was willing to hear any evidence which in his opinion would tend to rebut the issue of probable cause.

The concluding part of his opinion striking out the testimony of Blackburn and Scott reads (R. 46):

> The question of probable cause goes to the point as to whether or not there has been an offense against the Government and whether there are reasonable grounds to believe the defendant to have been a party to it and not on the question of his guilt or innocence under said charge, that to be determined by trial in the Court having jurisdiction.

> In the light of the foregoing, it is my opinion that evidence offered on the part of the defendant which is strictly defensive in its nature is not admissible and the motion to strike such evidence as has already been heard, of a defensive nature, made by Counsel for the Government is sustained.
>
> The Motion to commit or bail for appearance for trial by Counsel for the Government and Motion to dismiss are not herein ruled on pending such further proceeding or evidence offered at time to which this cause has been continued.

As further showing the sound reasoning which led the Commissioner to decline to hear the testimony of so-called "customer" witnesses it will be observed he stated on page 58 of the Record:

> The way I look at it, as I have stated before, if the customer didn't know that he was held as a customer of a certain organization because of some agreement that the manager of that plant had entered into, and if there was such an agreement, and by reason of that fact he wasn't buying as cheaply as he could, his testimony that he didn't know those facts to exist wouldn't amount to a great deal.

The text of the opinion shows that the Commissioner had examined the indictment and thought it charged an offense and showed a venue in the Northern District of Ohio. (R. 45.) It further shows he had before him and was guided by *Collins* v. *Loisel,* 259 U. S. 309; *Price* v. *Henkel,* 216 U. S.

488; and *Charlton* v. *Kelly,* 229 U. S. 447. (R. 45.)

The Commissioner's action in excluding the testimony of these two "customer" witnesses is vigorously criticized by counsel for appellant, particularly his holding that their testimony was inadmissible because "strictly defensive." But that is the very distinction made in *Collins* v. *Loisel, supra,* where Mr. Justice Brandeis, speaking for the court, said, on pages 315 and 316 of the opinion:

> Collins was allowed to testify, and it was clearly the purpose of the committing magistrate to permit him to testify fully, to things which might have explained ambiguities or doubtful elements in the *prima facie* case made against him. In other words, he was permitted to introduce evidence bearing upon the issue of probable cause. The evidence excluded related strictly to the defense. It is clear that the mere wrongful exclusion of specific pieces of evidence, however important, does not render the detention illegal.

That case and *Charlton* v. *Kelly, supra,* related to proceedings the purpose of which were to extradite the accused to a foreign country. The functions of a committing magistrate in such case are the same as in a hearing under Revised Statutes, Section 1014 (*United States* v. *Levy,* 268 U. S. 390, 393), except that in an extradition case, obviously a broader and more detailed inquiry into the charge against the accused is in order. *Beavers* v. *Henkel,* 194 U. S. 73, 82, 83.

The testimony of Blackburn and Scott, taken at its highest value, was unresponsive to the issue presented. These two purchasers of malleable iron castings, one of whom had never heard of the trade association, charged to have been the instrumentality by which the conspiracy was effected (the record is silent as to the other's knowledge), testified that their trade was solicited by a small percentage of the defendants and certain other manufacturers who did not belong to the Association. They thought the prices of appellant's company were fair and reasonable. In their opinion they could have bought castings elsewhere on the same or better terms. However, during the period covered by the indictment, both witnesses bought all their castings from the Iowa Malleable Iron Company. Of course, they had never been told they were assigned to any manufacturer as exclusive customers. The St. Louis Malleable Iron Company, a defendant, had offered to do some of Blackburn's work at prices lower than those he was paying, *but would not take all the work.*

The testimony of appellant touched on all points of which "customer" witnesses could have had knowledge and many other matters. His repeated assertion (R. 50, 52) that the only reason his company had joined the American Malleable Castings Association was in order to obtain the benefit of the scientific work was disproved on his cross-examination. It appeared there (R. 60 *et seq.*) for the

first time that his company had subscribed to an information service maintained by the Association. Such service, of which it is to be desired that the record might contain more information, had nothing whatever to do with metallurgical or scientific work. Under it appellant periodically filed lists of his customers with the Association (R. 68), and received information as to the prices of all business closed by other members. (R. 67.) Appellant also sent to the Association information as to business done by his company (R. 67), and could obtain from it information as to who had listed a buyer of castings as a customer. (R. 66.) He could use his own judgment as to whether he should go further and get information from the foundry which had listed a customer. (R. 66.) The explanation of this scheme was that appellant was thereby enabled to obtain information from his competitors as to their previous experience with the customer.

On a removal hearing, the committing magistrate has a broad discretion in refusing to hear evidence. As stated in *Collins* v. *Loisel*, 259 U. S. *supra*, 309, at page 317:

> Whether evidence offered on an issue before the committing magistrate is relevant is a matter which the law leaves to his determination, unless his action is so clearly unjustified as to amount to a denial of the hearing prescribed by law.

Certainly a grave doubt may have existed in the mind of the Commissioner as to the legality of the

conditions under which appellant was conducting his business. The situation developed on appellant's examination is within the rule stated in *Henry* v. *Henkel,* 235 U. S. 219, at page 227:

> These important and far-reaching questions, though elaborately argued, should not be decided on this record, in view of the rule relied on by the Government that such issues must primarily be determined by the trial court.

It is submitted that the record discloses that appellant had a hearing which in no wise deprived him of his constitutional rights and that the discretion of the Commissioner in ruling on the admissibility of evidence offered and rejected should, in this instance, be not disturbed.

III

THE DISTRICT COURT HAD BEFORE IT ALL THE EVIDENCE AND UPON IT CONCLUDED THAT PROBABLE CAUSE EXISTED, BUT WHATEVER REASON IT HAD FOR DISCHARGING THE WRIT, THE ORDER SHOULD BE AFFIRMED SINCE THE RECORD SHOWS APPELLANT HAD A FAIR HEARING BEFORE THE COMMISSIONER.

The precise question before the District Court (it is also the question here) was whether on the record before it, which consisted of a transcript of all the proceedings before the Commissioner, there

was any substantial evidence upon which the Commissioner might, in the exercise of his jurisdiction, have decided that there was probable cause for believing that appellant had committed the offense charged in the indictment. If so, it had no function except to discharge the writ. *Price* v. *Henkel,* 216 U. S. 488, 491.

The opinion of the District Court in so far as it related to probable cause was as follows (R. 73, 74):

> When we compare and analyze all the authorities submitted in the very complete briefs of counsel, the only real question in this case is the sufficiency of the indictment.
>
> If the indictment is sufficient and the identity of the defendant is admitted or proven, a complete case for removal is established.
>
> Language is found in the cases which seem to indicate that the defendant is entitled to a hearing upon the merits of the question of guilt or innocence, but this question was very definitely disposed of by the Circuit Court of Appeals in this Eighth Circuit in the recent case of *Looney* v. *Romero, U. S. Marshal,* 2 Fed. (2d) 22, in which it is said:
>
> "Position of the appellant at the hearing, and his evidence, was simply to the effect that he did not commit the crime; that of course is a matter to be tried out under the indictment."

> It is my duty to follow this last announcement of the Court of Appeals of this Circuit.

Counsel for appellant admit that the *Commissioner* based his finding on the indictment and the evidence of appellant (Brief 57), but argue that the *District Court* erred in disregarding such evidence.

They overlook the fact that whatever Judge Wade's reasons for discharging the writ may have been, if his action in doing so was correct, the judgment should be affirmed.

Upon analysis of Judge Wade's opinion, it does not appear that he refused or declined to consider the evidence before the Commissioner. He held that if the indictment is sufficient and the identity of the defendant is proven, a complete case for removal is established. This is so if such case is not rebutted by the defendant. He rested his decision squarely on the case of *Looney* v. *Romero, supra,* where the rule is very clearly stated that an indictment is to be taken only as *prima facie* evidence of probable cause. Necessarily, the District Judge must have had in mind the fact that such *prima facie* case, as every *prima facie* case, connoted a corresponding right in the defendant to rebut. Any other inference would ignore the meaning of "*prima facie.*" The other point decided in *Looney* v. *Romero* was that a denial of guilt by a defendant

is a matter to be tried out where the indictment was found. Judge Wade's opinion quotes the statement to that effect from *Looney* v. *Romero*, and the fair inference to be drawn is that he considered appellant's testimony to amount to no more than an elaborate denial of guilt.

CONCLUSION

The sole question presented by this appeal is whether there was any substantial evidence before the District Court and the Commissioner, upon which, in the exercise of their judicial discretion, they could reasonably have decided that there was probable cause to believe appellant had committed the offense charged in the indictment. For the reasons set forth above it is submitted that the appellant's contention has no merit.

Inasmuch as the Commissioner's rulings on evidence are not reviewable on *habeas corpus* proceedings there is in this case no contention which could possibly be open for argument in the Circuit Court of Appeals. No ground, therefore, exists for transferring the appeal to the Circuit Court of Appeals under section 238a of the Judicial Code (Act of September 14, 1922, c. 305, 42 Stat. 837). There is no conceivable ground upon which that court could decide in favor of the appellant. Such a transfer would result only in delay.

It is therefore respectfully submitted that the order of the District Court discharging the writ be affirmed.

WILLIAM D. MITCHELL,
Solicitor General.
WILLIAM J. DONOVAN,
Assistant to the Attorney General.
CLIFFORD H. BYRNES,
Special Assistant to the Attorney General.

APRIL, 1926.

APPENDIX A

UNITED STATES CIRCUIT COURT OF APPEALS SIXTH CIRCUIT

4460

G. F. MEEHAN, APPELLANT, *v.* UNITED STATES, APPELLEE—APPEAL FROM THE DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

4573

E. C. HOWELL, APPELLANT, *v.* UNITED STATES, APPELLEE—APPEAL FROM THE DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

Decided March 12, 1926

Before DENISON, DONAHUE and MOORMAN, *Circuit Judges.*

DENISON, *Circuit Judge:* These two appeals present substantially the same question and were heard together. In the Northern District of Ohio, at Cleveland, an indictment was returned charging violation of the Antitrust law. The defendants were the American Malleable Castings Association, many firms or corporations said to be members of the association, and many individuals said to be the active managers of the corporations. One of these individuals—Meehan—whose home and whose corporation's place of business were in Knoxville, Tennessee, was arrested for the purpose of removal, was taken before a Commissioner for the purpose, a hearing was had and the Commissioner refused

an order of removal. Thereupon he was taken before the District Judge, who again heard the application for removal made by the Government and granted it. Upon *habeas corpus* proceedings before the same judge, the order of removal was held proper and Meehan was remanded for that purpose. His appeal from this order is number 4460. Number 4573 is the appeal of Howell, coming from the Western District of Michigan. He was another defendant in the same indictment, was also ordered removed to Cleveland and, upon his *habeas corpus* petition, was remanded so that the warrant of removal might be executed.

Upon the removal proceedings before the judge in the Meehan case, it was first objected that the order of the Commissioner denying removal constituted an adjudication. This contention being overruled, the Government offered a certified copy of the indictment, and also documents which it was said would constitute part of its proofs upon the trial. These included the Rules of the Association, its membership list and certain letters said to have been exchanged with members in furtherance of the unlawful purpose of the Association. One of these letters was from Meehan's corporation and was signed by him. Thereupon, Meehan testified, admitting his identity with the defendant named in the indictment, and admitting the existence of the Association, his corporation's membership in it and his managerial relation to the corporation. He and other witnesses called for him described in detail the history of the relation between his corporation and the association, and what had been done by the corporation in connection with its membership. The testimony was presented as a com-

plete denial of any act by or for the corporation in connection with its membership. The testimony was presented as a complete denial of any act by or for the corporation, or by Meehan, which would be in violation of the Antitrust law. At the end of the hearing the Government claimed that probable cause appeared, not only from the indictment but also from the proof, while Meehan claimed that the initial effect of the indictment, as justifying removal, was conclusively destroyed.

In this court the sufficiency of the indictment is attacked, and, on the other hand, it is said that the indictment must be judged not as a criminal pleading but as a piece of evidence. Considering it as a criminal pleading, and without doubting that an indictment may so completely fail to charge an offense, "however inartifically" that it can not be "evidence tending to establish" anything and could not support a removal order, it is enough to say that this indictment is not subject to that measure of condemnation. It charges in terms a violation of the Sherman Act, and then sets out facts which the pleader plainly intended to constitute the necessary support for the charge. Whether these facts were sufficient to carry the case over the sometimes doubtful line between reasonable and unreasonable restraint of trade, was not a question to be decided in the removal proceedings (*Pierce* v. *Creecy,* 210 U. S. 387, 401–2; *Henry* v. *Henkel,* 235 U. S. 219, 229; *Morse* v. *U. S.,* 267 U. S. 80, 83), but is for the courts of the trial jurisdiction; and the reviewing powers of this court in this proceeding are not affected by the fact that it may later be called upon to review the trial at Cleveland.

When we come to the function of the indictment as evidence, we find some confusion in the cases, or at least in the thoughts expressed. If it were taken as *prima facie* evidence of guilt, in the largest sense of the term, "*prima facie*," logical difficulties would arise, because then it would continue of full force, and at the end of every removal proceeding there would be a conflict of evidence, which that tribunal could not try. The cases usually speak of it as *prima facie* evidence, not of guilt, but of the existence of probable cause. This is perhaps another way of saying that it raises an initial presumption—which might as well be arbitrary as evidential—which continues until it is in some vital particular overcome by entirely convincing testimony. Wherever there is affirmative proof, unchallenged except by the indictment, demonstrating lack of guilt, removal should be denied; if the conclusion of no probable cause is put in any substantial doubt by proofs in addition to the indictment, the removal should be made. These we take to be the applicable principles as expressed in the late cases. (*Haas* v. *Henkel*, 216 U. S. 462; *Price* v. *Henkel*, 216 U. S. 488; *Beaver* v. *Henkel*, 194 U. S. 73, 85; *Morse* v. *U. S.*, 267 U. S. 80.)

It follows, we think, as applied to this kind of case, that whenever guilt lies in the unlawful use of those association facilities which may be used rightly or wrongly, and any particular defendant by credible testimony disputes any connection whatever by him with any unlawful activities of such ambiguous association, the Government should make some proof of his guilty activities. Hence, in this case, the letters between the Association and members in Pittsburgh and other places which (it

is said), reveal the employment of unlawful plans and methods, have no necessary tendency to show that Meehan and his company in Knoxville participated in anything forbidden. There remains, however, in this case, a letter written by Meehan to the Association in 1919. The true interpretation of the letter and of the explanation which Meehan gives, will be for the tribunal which tries the case. We can not now say that there would be error of law upon that trial if the letter in connection with the (perhaps) deficient explanation which Meehan gives, were taken by the jury, in connection with proof of the general character of the Association, as the basis of an inference that he and his company were then using the Association structure for unlawful purposes. So we find here what may rightly be thought probable cause for bringing Meehan and his company to trial.

We do not overlook that this letter was written more than three years before the indictment. In some situations that would be the end of it; but the subject matter here involved is the manner of employing methods of business and facilities of doubtful legality. Meehan and his company continued to belong to the Association up to the date of the indictment; there is no evidence that they revised their methods or underwent any change of spirit; Meehan's testimony regarding the letter is rather a denial of certain possible meanings than a claim that it was an instance of methods now abandoned. Upon the whole we can not say that there was no probable cause for believing that the methods indicated by the letter continued up to a time within the statute of limitations. The order in 4460 must be affirmed.

In 4573 no evidence was presented for Howell; the appeal raises only the sufficiency of the indictment; and with one exception the case is covered by what has been said. It is insisted that Howell is not specifically implicated, and hence that no offense is charged against him. The indictment, after having named the corporations, said that "Said corporations * * * respectively have had divers officers and agents who have been actively engaged in the management, direction, and control of their affairs and business;" and that "such officers and agents" are named in the following list showing with which corporation they have been affiliated. In this list the name of Howell is given in affiliation with one of the corporate defendants. The indictment then charges that the corporate defendants "under said management, direction, and control" have carried on their business in the unlawful way. Distributing these allegations, there is a distinct charge that the corporate defendant, in its unlawful acts, has been under the management, direction, and control of Howell, and that its elimination of competition by agreement and its allotment of exclusive customers, have been done under Howell's direction. This seems to us sufficient, either under the general principles involved or under Section 14 of the Clayton Act. The sufficiency of the indictment upon this point of personal participation by Howell is not destroyed by the evidence offered by the Government in support of the removal petition, from which it appeared that he was represented on the membership list to be "Assistant Manager" of his corporation, while the company had some one else as president, and some one else as general manager. These

nominal titles do not necessarily indicate the scope of the activities of the officers or agents in such a way as to neutralize the distinct charge of the indictment.

The order in 4573 will also be affirmed.[1]

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[1] Former reported opinions in removals growing out of this same indictment are: *U. S.* v. *Mathues*, 6 Fed. (2) 149; *Fitzgerald* v. *U. S.*, 6 Fed. (2) 156; *U. S.* v. *Moore*, 7 Fed. (2) 734.

APPENDIX B

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

October Term, 1925, January Session, 1926

No. 3623

UNITED STATES OF AMERICA EX REL. RUPERT A. NOURSE, APPELLANT, *v.* R. J. WHITE, UNITED STATES MARSHAL, APPELLEE.—APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN

February 15, 1926

Also appeals in Nos. 3624, 3625, 3626, 3627, 3628, 3629.

Before ALSCHULER, PAGE and ANDERSON, *Cir. JJ.*

ALSCHULER, *Cir. J.*: These seven appeals were by stipulation heard upon the same record, the applicable facts being the same in all. Appellants, residents of the Eastern District of Wisconsin, with other individuals and various corporations, were jointly indicted in the Northern District of Ohio for alleged violation of the Sherman Antitrust Act, and their removal to the Ohio district was undertaken. Hearing was had before the district judge of their district, and on behalf of the Government the indictment only was offered in evidence,

and was received over objection of appellants. Thereupon appellants offered to make proof by their own testimony and by that of others in rebuttal of the *prima facie* probable cause which the judge held that the evidence of the indictment afforded. Upon the Government's objection it was held that the evidence was incompetent and the witnesses were not permitted to testify, and the formal tender of proof made on behalf of appellants was rejected. Upon refusal of appellants to give bail they were thereupon ordered into custody for removal, whereupon, on behalf of each appellant, petition for *habeas corpus* was sued out, to which appellee made return, setting up all that transpired at the hearing before the judge. The ground alleged in the several petitions was that the petitioner was denied opportunity at the hearing to show by evidence a want of probable cause of his guilt, and was thus denied his constitutional rights in such respect. After the hearing of the several writs of *habeas corpus* the judge ordered them dismissed, and the petitioners remanded to the custody of the marshal. The appeals are from these final orders.

With the district judge's action in admitting the indictment in evidence and holding it to be *prima facie* showing of probable cause, we are in accord. But, identity being conceded, it is evident from the record that the judge regarded the indictment as irrebuttably establishing probable cause. This view is not sustained by the case of *Tinsley* v. *Treat,* 205 U. S. 20. It was there said, respecting the duty of a district judge in the removal proceeding,

> "And it has been repeatedly held that in such cases the judge exercises something

> more than a mere ministerial function involving no judicial discretion. He must look into the indictment to ascertain whether an offense against the United States is charged, find whether there was probable cause, and determine whether the court to which the accused is sought to be removed has jurisdiction of the same."

There, as here, after the indictment had been received in evidence the defendant sought to present evidence to rebut the probable cause which the indictment primarily established. Cases were cited to the court to indicate that the indictment afforded *prima facie* evidence of probable cause, but it had not theretofore been determined whether evidence on the part of the accused to rebut this presumption could be admitted. In this situation the court said:

> "It was held in *Beavers* v. *Henkel*, 194 U. S. 73; *Benson* v. *Henkel*, 198 U. S. 1; *Hyde* v. *Shine*, 199 U. S. 62, as well as *Greene* v. *Henkel*, *supra*, that an indictment constituted *prima facie* evidence of probable cause, but not that it was conclusive.
>
> We regard that question as specifically presented in the present case and we hold that the indictment can not be treated as conclusive under section 1014.
>
> This being so, we are of opinion that the evidence offered should have been admitted."

The court held that by exclusion of the rejected evidence, the constitutional rights of the petitioner, had been invaded, and that he was entitled to discharge on *habeas corpus*.

This ruling has been followed without question. This court applied it in *United States* v. *Black*,

160 Fed. 431. Indeed, counsel for the Government freely concede that the case controls, and that if these appellants were denied the right of presenting on the hearing evidence to show want of probable cause, the order of the district judge must be reversed. But they contend that the proof which was offered, if admitted, could not have overcome the *prima facie* case which the Government made. But again the striking similarity in the essential facts of *Tinsley* v. *Treat* comes to appellants' aid. There the offense whereon the indictment was predicated was similar to that here, and upon the hearing of the removal proceeding, after the indictment had been received in evidence, defendant's counsel offered to prove by the defendant and other witnesses that the court of the district in which the indictment was found had no jurisdiction of the defendant, and that the defendant and other witnesses would, if permitted, testify that the defendant never did the acts charged in the indictment at any time or place. To this the Government objected and the court sustained the objection. There, as here, it was claimed for the Government that the evidence was immaterial and could not have served to show want of probable cause. In this situation the court said:

> "It is contended that that evidence was immaterial, and, if admitted, could not have affected the decision of either the District or Circuit Judge. Of course, if the indictment were conclusive, any evidence might be said to be immaterial, but if the indictment were only *prima facie,* then evidence tending to show that no offense triable in the Middle District of Tennessee had been

committed by defendant in that district could not be regarded as immaterial."

The offer of proof here made was surely not less specific or relevant than on the same issue in *Tinsley* v. *Treat*. That the evidence here offered would have been competent in defense on the trial of the cause cannot, as is contended, influence its competency or effect on the preliminary issue of probable cause. There is no necessary relation between the two. Within reasonable limitations the offered evidence was proper as tending to inform the judge whether there was "such reasonable ground to suppose him guilty as to make it proper that he should be tried." (See *Collins* v. *Loisel*, 259 U. S. 309.)

Because of the refusal to hear any evidence for appellants which might tend to establish want of probable cause, the orders of dismissal of the writs and remandment of the several appellants are reversed, and the causes are remanded, with direction to discharge the several appellants from custody, without prejudice to a renewal of application to remove, and procedings thereon not inconsistent herewith.

A true Copy.

Teste:

_____ _____,

Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

APPENDIX C

IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

October Term, 1925, January Session, 1926

No. 3648

UNITED STATES OF AMERICA EX REL. F. C. RUTZ, APPELLANT, *v.* PALMER E. ANDERSON, UNITED STATES MARSHAL, APPELLEE—APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

February 15, 1926

Also appeals in Nos. 3649 and 3656.

Before ALSCHULER, PAGE and ANDERSON, *Cir. JJ.*

ALSCHULER, *Cir. J.:* The three appeals were heard on the same record. Appellants, residents of the Northern District of Illinois, were, with others, indicted in the Northern District of Ohio. They are codefendants in the indictment referred to in case No. 3623, *United States ex rel. Nourse* v. *White, Marshal,* opinion in which is this day filed.

The facts, as stated in the *Nourse case,* are in all essential particulars like those appearing on this record, save only that in the instant cases, prior to the proceedings before the Illinois district judge, removal proceedings were had before a United States commissioner of that district, who heard

evidence, and, holding that probable cause did not appear, discharged appellants. Later the proceedings set out in the petition and return shown in this record were instituted before the district judge. It was then contended for appellant Rutz that the action of the commissioner was final, and this question went to the Supreme Court, where it was held that, notwithstanding the discharge by the commissioner, a new proceeding for removal could be entertained by the district judge. *United States ex rel. Rutz* v. *Levy,* 268 U. S. 390.

The appeals here, as in the *Nourse case,* are from orders dismissing writs of *habeas corpus* and remanding appellants for removal, following the holding of the district judge that the indictment offered in evidence sufficiently indicated probable cause, and that no evidence would be received in rebuttal. What we said in the Nourse case is likewise here applicable.

Because of refusal to hear any evidence for appellants which would tend to show want of probable cause, the orders of dismissal of the writs and remandment of the several appellants are reversed, and the causes are remanded, with direction to discharge the several appellants from custody, without prejudice to renewal of application to remove, and proceedings thereon not inconsistent herewith.

A true Copy.
Teste:

_____ _____,
Clerk of the United States Circuit Court
of Appeals for the Seventh Circuit.

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